No. 12583

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH R. HASTINGS and
LYLE McDANIEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

Jurisdiction of this Court to consider the appeal in this cause is set out on Pages 1, 2 and 3 of the Appellants' brief.

STATEMENT OF THE CASE

Appellants were indicted and tried in the Northern Division of the Western District of Washington for violation of Sections 2729 and 3261, Title 26, U.S.C., and sentenced to serve two years each. The indictment is set out on Page 1 of the Transcript of Record and charges in effect that the appellants were in possession of a double-barrelled, sawed-off shotgun without having registered the possession of the same with the Collector of Internal Revenue as required by law.

The evidence developed by the Government showed that the appellants were found in possession of a double-barrelled shotgun, the barrels of which were less than thirteen inches in length. At the time the appellants were apprehended they were in a vehicle headed north away from the City of Seattle on Highway 99 in the direction of Everett, Washington. The evidence further revealed that the appellants had not registered possession of the firearm with the Collector of Internal Revenue.

QUESTIONS RAISED

There are three questions presented in this appeal:

1. Can the appellants in an appeal from an

order denying a petition to vacate judgment, based on Section 2255, Title 28, U.S.C., raise questions for review by this Court involving questions of fact and law which should have been raised by an appeal from the conviction?

2. Assuming, but not conceding, that the first question is answered in the affirmative, is the operation of Sections 2729 and 3261, Title 26, U.S.C., suspended during the hours which the office of the Collector of Internal Revenue is closed?

3. Assuming, but not conceding, that the first question is answered in the affirmative, is there a duty upon the appellants to register the possession of a firearm in accordance with Section 3261, Title 26, U.S.C., when they cut off the barrels of a shotgun themselves.

SPECIFICATION OF ERROR

Specification of error upon which the appellants rely is set out on Page 6 of the appellants' brief.

ARGUMENT

1. THE QUESTIONS RAISED IN APPELLANTS' PETITION TO VACATE JUDGMENT CONCERNING QUESTIONS OF LAW AND FACT SHOULD HAVE BEEN RAISED ON AN APPEAL FROM THEIR CONVICTION AND CANNOT NOW BE RAISED ON AN APPEAL FROM AN ORDER DENYING A PETITION TO VACATE JUDGMENT.

The original petition of the appellants as set out on Pages 7 to 11 of the Transcript of Record states that the petitioners were convicted for a violation of Section 902(f), Title 15, U.S.C. Although the appellants had previously been convicted of robbery from a person by violence and were on conditional release from McNeil Island at the time the offense in this case occurred, the appellants were not charged with violation of Section 902(f), Title 15, U.S.C., but were charged with violating the provisions of Sections 2729 and 3261, Title 26, U.S.C. Therefore, the statements in the original petition, with regards to transportation of a firearm in interstate commerce, are immaterial and should not be considered in this appeal.

The other two points raised in the original pe-

tition to vacate judgments and sentences and the supplement thereto are first, that the appellants did not cut off the barrels of the shotgun until 4:30 P. M. on Friday, April 15, 1949, and, therefore, there was no duty to register the firearm until the office of the Collector of Internal Revenue or the Alcohol Tax Unit opened on Monday morning, and second, that there is no duty to register possession of the sawed-off shotgun when the possessors themselves cut the barrel off.

It is the Appellee's contention that both of these are questions of law and fact which must be raised on an appeal from the conviction. The time for such an appeal had long since expired when notice of appeal was filed in this cause. The judgments and sentences were entered on June 16, 1949. Notice of appeal in this matter was filed April 25, 1950.

Section 2255, Title 28, U.S.C., gives to a person in custody the right to make a collateral attack on the judgment of conviction by way of motion or petition to the Court which sentenced him. This statute in effect takes the place of what has heretofore been known as a writ of coram nobis.

This Court in the case of *Audette vs. United States*, 99 Fed. (2d) 113, held that questions which should be raised on appeal cannot be considered in

an application for a writ coram nobis. The appellants in this case should not be permitted to raise questions in a petition based upon Section 2255, Title 28, U.S.C., which could not be raised heretofore in a writ coram nobis.

This identical question was ruled upon in the Fourth Circuit in *Howell vs. United States*, 172 Fed. (2d) 213 wherein the decision states:

> "It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A. 2255."

In Taylor v. United States, 177 Fed. (2d) 194, the Court of Appeals for the Fourth Circuit again ruled upon this question in the following language:

> "Prisoners adjudged guilty of crime should understand that 28 U.S.C.A. Sec. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral

attack may the attack be made by motion under 28 U.S.C.A. Sec. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus."

2. THE OPERATION OF THE STATUTE REQUIRING FIREARMS TO BE REGISTERED IS NOT SUSPENDED DURING THE HOURS WHEN THE OFFICE FOR REGISTRATION IS CLOSED.

Although the appellee firmly believes that the questions raised by the appellants in this appeal cannot properly be considered by this Court in reviewing an order denying petition to vacate judgments under the provisions of Section 2255, Title 28, U.S.C.A., the appellee will herein answer the arguments of appellants.

Since the Government has no right of appeal in criminal cases, it is unlikely that questions similar to those raised by the appellants here would ever be presented to an Appellate Court. In the absence of a ruling upon such questions as these by an Appellate Court, it is conceivable that some other defendants might persuade a trial judge to adopt the theories presented by the appellants here. If such were to happen and the jury was so instructed, and

the defendants acquitted, this Court would never have an opportunity to correct the error in view of the fact the Government has no right to appeal.

Section 2729, Title 26, U.S.C., states in effect that "any person who violates or fails to comply with any of the requirements" of Section 3261 shall be punished. Section 3261 states in effect that every person possessing a firearm shall register the same. Neither of these statutes require any intent. Therefore, the appellants' argument to the effect that the Government must prove that the appellants did not intend to register the firearm is of no avail.

The statute as passed by congress makes it an offense to have possession of a firearm without having registered the same. The appellants contend that the evidence showed that the barrel of the shotgun was not cut off and made a firearm within the definition of Section 2733, Title 26, U.S.C., until after 4:30 on the afternoon of Friday, April 15, 1949, and that, therefore, there was no duty to register the firearm until the proper offices for registration opened on Monday morning. The appellants base their contention upon impossibility of performance. The appellee contends that this argument is untenable. In the first place there was nothing to compel the

appellants to cut off the barrel at any time, except perhaps their own desire to use the sawed-off shotgun in some crime of violence. A sawed-off shotgun is only good for one purpose and that is killing human beings. The only logical conclusion that can be drawn from appellants' act of cutting off the shotgun is that they intended to use it for such purpose. The obvious purpose of Congress in passing the acts here involved was to keep such weapons out of the hands of hoodlums.

If the appellants' contention is a legal defense to the crime charged in the indictment, the same theory would apply to all statutes requiring a license to be issued, or registration to be perfected, before the doing of some act. For instance, anyone could practice law without a license claiming that no examination for the bar had been given since the time he started to practice. Anyone could fish on Sunday without a license claiming that there was no office open where they could obtain such license at the time they wanted to fish. An operator of a motor vehicle would not have to have a driver's license if he only drove during the hours when the office for issuing such license was closed.

The same argument which is presented in the appellants' brief was also presented to the Court

and jury at the time of the trial of this cause. Even if the appellants' theory were a valid defense, it is a matter of fact which the jury alone could decide. The appellants' brief is based upon the assumption that the only evidence as to the time when the barrels of the shotgun were cut off is fixed at 4:30. This is based upon the testimony of Frances L. Lewis as set out on Pages 58 through 62 of the Transcript of Testimony. That witness testified that the shotgun had thirty-inch barrels at 4:30 on Friday afternoon, April 15, 1949. The inference, of course, which the appellants seek to draw from this testimony is that it is proof that the barrels of the shotgun were not cut off at thirteen inches until after the offices of the Collector of Internal Revenue and Alcohol Tax Unit were closed for the weekend.

The appellants, however, failed to take into consideration conflicting testimony as set out in the statements of the appellants introduced in evidence as Exhibits 2 and 3. They are quoted on Pages 55 through 57 of the Transcript of Testimony. In Exhibit 2, the statement of Lyle McDaniel, he states that about 1:30 in the afternoon Hastings asked him "to drive to his friend's house", presumably the house of Frances L. Lewis, to pick up the shotgun. McDaniel goes on to state that it was about 2:00 when

he parked in front of the friend's house, and that thereafter the appellants cut off the barrels.

In the signed statement of Kenneth R. Hastings he confirms the time of 1:30 in the afternoon as set out in the statement of McDaniel.

It will thus be seen that there is a direct conflict in the signed statements of the appellants and the oral testimony of Frances L. Lewis and, therefore, was within the providence of the jury to determine how soon after 2 P. M. the barrels of the shotgun were cut off. There was ample evidence for the jury to find that the barrels were cut off prior to 4:30 on the afternoon of April 15, 1949. The appellee contends, therefore, that even if this Court should adopt the theory of the appellants, the evidence in the case presents a question of fact which the jury has decided against the appellants and this Court should not upset the jury's finding when the same was based upon ample evidence.

It should also be pointed out that neither of the appellants testified before the jury. If Exhibits 2 and 3 were in error as to the time when the shotgun was procured from the home of a friend, the appellants had every opportunity to take the stand and correct such error. Having elected to forego their right to testify in their own behalf, the appellants

cannot now contend that their signed statements were not correct. The time at which the barrels were cut off is peculiarly within the knowledge of the appellants.

The appellants seek comfort in comparing the sentence in the letter of Judge Driver set out on Page 16 of the Transcript of Record, "I think that the crux of the offense is possession of an unregistered firearm", with the language used in *Crapo vs. United States*, 100 Fed. (2d), 996, which states:

> "The gist of the offense charged in count 1 is the possession of the firearm and the failure to register the same."

The appellee contends that for all practical purposes the statement of Judge Driver in his letter and the above quotation from the Crapo case are identical and no error can be inferred therefrom.

3. THEIR ACT OF CUTTING OFF THE BARRELS OF A SHOTGUN SO THAT THEIR LENGTH IS THEREAFTER THIRTEEN INCHES IS AN ACT OF ACQUIRING A FIREARM AND SUCH IS NOT IN CONFORMITY WITH THE ACTS OF CONGRESS.

The second question raised in the appellants' appeal is also one which was considered by the Court and the jury at the time of the trial and as such is

not a question which can be raised on an appeal from an order denying ~~judgment~~ petition under the provisions of Section 2255, Title 28, U.S.C.

Upon the second question presented in the appellants' brief, it is argued that since the shotgun as originally acquired by the appellants had a thirty-inch barrel and they thereafter cut off the barrel to thirteen inches that they had acquired the sawed-off shotgun in conformity with the law.

Section 3261(b), Title 26, U.S.C., reads as follows:

> "Every person possessing a firearm shall register with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this subsection with respect to any firearm acquired after July 26, 1934, and in conformity with the provisions of this part and subchapter B of chapter 25."

It is clear from the plain reading of this statute that every person must register the possession of a firearm unless the circumstances fall within the exception thereto. The exception, which is set out in the words following the word "provided" in the stat-

ute, relieves the possessor of a firearm from registering if (1) The firearm was acquired after July 26, 1934, and (2) acquired in conformity with the provisions of Sections 2720 through 2733, Title 26, U.S.C. Both elements of the proviso must be present in order for the exception to apply. If congress had intended otherwise the conjunction "and" would not have been used but the word "or" would have been used in drafting the legislation. Therefore, unless the firearm came into the appellants' possession after July 26, 1934 and in accordance with the provisions of Sections 2720 to 2733, Title 26, U.S.C., the appellants have violated the law. If they acquired the firearm before July 26, 1934 it must be registered in any event.

By some reasoning, not explained in the appellants' brief, it is argued that the act of cutting off the barrels of a shotgun is acquiring a firearm in accordance with the provisions of Sections 2720 to 2733. A careful reading of these sections reveals that they provide a method whereby firearms may be manufactured, imported, dealt in and transferred in a lawful manner. It logically follows that any method of acquiring a firearm not in accordance with the provisions of the above mentioned sections renders

the possessor thereof guilty of violating Section 3261(b) unless he registered the same.

It will be noted from reading Sections 2720 through 2733, Title 26, U.S.C., that those sections provide a method of registration of firearms which render the need for registration in accordance with Section 3261(b) unnecessary.

The sections mentioned provide a method for the lawful transfer, manufacture, importation, etc. of firearms and for the collection of the tax imposed thereon. When these sections have been complied with, the purpose of Section 3261(b) which is an aid of taxation has already been accomplished.

This Court in effect has stated this premise in the following language of the decision in *Fleish v. Johnston*, 145 Fed. (2d) 16:

> "It is evident that the statute requires every firearm to be registered. The registration involves a complete identification of each individual firearm as well as a statement concerning its present possessor and whereabouts. A record of the latter statement without the identification of the weapon itself obviously would fail to satisfy the terms of the act. The crime defined by the statute is the failure to register a specific firearm in one's possession, not the failure to indicate generally that one possesses firearms. Cf. the statute in *People v. Puppilo*, 100 Cal. App. 559, 280 P. 545. Therefore, the nonregis-

> tration of any one firearm in one's possession constitutes a complete offense separate and distinct from the nonregistration of any other such firearm."

In the case of *United States v. Penn*, 115 Fed. (2d) 672, the appellant was convicted for having a sawed-off shotgun in his possession without having complied with the requirements of the Internal Revenue Code. The facts of the case as reported in the decision reveal that the gun had belonged to the appellant's brother who occupied the premises before his death some years prior to the appellant's arrest. The decision then goes on to state:

> "Defendant did not deny that the gun had been in the closet during his occupancy of the premises for a period of about three years and that he had used the closet. Consequently, the evidence was ample to support the charge that the defendant had the gun in his possession. The evidence establishes that the defendant did not comply with the provisions of the Internal Revenue Code, and in fact the defendant does not contend that he did."

The appellants in the Penn case acquired possession of a sawed-off shotgun in a manner other than that provided in Section 2720 through 2733, yet the Court did not consider the appellants relieved of the duty to register the possession of the firearm. It should also be pointed out that the appellant in the Penn case apparently did nothing of his own volition to acquire

the possession of the sawed-off shotgun other than to take over the premises of his brother, while in the case at hand, the appellants actively sought possession of a sawed-off shotgun by cutting off the barrels themselves.

A learned explanation of the validity of Section 3261(b) and the reasons for its existence set out in the decision in *United States v. Cumbee*, 84 Fed. Supp. 390, from which the following quotation is taken:

> "Section 3261 applies to all persons who possess guns which were not obtained in conformity with the statute. That is, it requires information on firearms concerning which the Government does not possess information already, but which may give rise to the statute's tax applicability on transfers or dealerships. In some instances, Section 3261 may be the means by which additional dealers subject to the tax can be discovered. For obviously, some persons might obtain firearms other than in conformity to the statute and thereby aid in avoiding the tax which would be required and collected if the possession was known and the dealership thereby revealed."

CONCLUSION

The appellee having respectfully shown to this Court that the matters raised on the appeal are not questions which can be considered on a motion to vacate judgment and, further, that there is no merit in the appellants' contentions that the operation of the statute involved are suspended during hours when the offices for registration are closed, and that the sawing off of the barrel of a shotgun relieves the possessor thereof of the duty of registering, it is requested that this Court affirm the order entered by the Honorable Sam M. Driver on April 17, 1950.

Respectfully submitted,

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